

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

_____)	
UNITED STATES OF AMERICA)	
)	
v.)	CASE NO. 05-10019-RGS
)	
DANIEL W. McELROY and)	
AIMEE J. KING McELROY)	
)	
_____)	

**DEFENDANTS' MOTION TO SUPPRESS IDENTIFICATION EVIDENCE AND
REQUEST FOR HEARING**

Defendants Daniel McElroy and Aimee King McElroy move to suppress any and all evidence at trial of the identification of Daniel McElroy as a principal, owner and/or operator of Daily A. King Labor, Inc. ("DAK"), Pro Temp Co. ("PT") and Precession Temp Corporation ("PTC"). Specifically, Defendants move to suppress evidence of any and all photographic identifications, witness testimony or documentary evidence relating to identifications allegedly made by witnesses Richard Donovan and Richard Demello identifying Daniel McElroy as a principal, owner and/or operator of PT, PTC or DAK. Defendants also move to suppress and exclude from trial any evidence of any in-court identification procedures of Daniel McElroy by these witnesses. Such identifications could only have been based on impermissibly suggestive and unreliable procedures. Further, the Defendants move for suppression of any evidence derived from such impermissibly suggestive and unreliable identification procedures.

The Defendants state that the admission of such testimony would violate their Rights to Confrontation under the Sixth Amendment to the Constitution of the United States and their rights to Due Process under the Fifth and Fourteenth Amendments to the U.S. Constitution. The

photographic identification procedures undertaken by the government, viewed in the totality of the circumstances, were so impermissibly suggestive and unreliable as to give rise to a very substantial likelihood of irreparable misidentification. Further, any evidence derived from such a suggestive procedure is constitutionally tainted. Manson v. Brathwaite, 432 U.S. 98, 111-114 (1977), Simmons v. United States, 390 U.S. 377,383 (1968), Stovall v. Denno, 388 U.S. 293, 301-302 , U.S. v. Wade, 388 U.S. 218, 239-241 (1968), U.S. v. Crews, 445 U.S. 463, 472-473 (1980), Wong Sun v. United States, 371 U.S. 471 (1963) and U.S. v. Nava-Ruiz, 515 F.Supp. 2d 198, 202-206 (1st Cir 2007).

Background:

The procedural basis for the Defendants' motion is as follows: On January 24, 2008 the government provided the defense for the first time with the FBI report of SA Nancy McCormick describing an identification procedure that she conducted with a government witness named Rick Demello of Sea Fresh Corporation in New Bedford, MA, on January 11, 2008. In her report dated January 10-11, 2008, McCormick writes that she told Demello that she was faxing him a photograph of a man she identified as Daniel McElroy. (See Defendants' exhibit 1). The next day, on January 12, 2008, McCormick called Demello who told her that he had received the faxed photograph and that, "while the image was dark, it looked like McElroy as he recalled from his meeting with him." (Defendants' exhibit 1). No exigent circumstances were present to justify such an unnecessarily suggestive procedure. The photograph that McCormick faxed to Demello was a photograph obtained from the Massachusetts Registry of Motor Vehicles dated February 4, 1998, almost ten years old. This identification procedure was undertaken just days before the start of the trial in a ten year old investigation. No exigency existed to justify such a suggestive procedure. Its unreliability is made more so by the lack of familiarity that Demello

has with McElroy and the conflicting claims that Demello has made concerning McElroy's physical appearance, alternately claiming that McElroy was "short"(see Defendants' exhibit 2, IRS report of SA Thomas Demeo dated 9.27.02 interview with Demello) and later claiming that McElroy was 5'8" tall(See Defendants' exhibit 1). Such discrepancies undercut any claim by the government that despite the impermissibly suggestive procedure the identification by Demello is reliable. None of the factors supporting reliability of the identification are present in the Demello/McElroy relationship. United States v. Nava-Ruiz, 515 F. Supp. 2d 198 , 203-206 (2007).

Previously, in her report dated on or about December 21, 2007, FBI Agent McCormick interviewed Richard Donovan of On A Roll Sales Corporation ("OAR") of 121 Liberty Street, Brockton, MA. At that time McCormick presented a single photograph of McElroy to Donovan and Donovan identified McElroy from the photograph (See Defendants' exhibit 3, page 2). It appears likely that SA McCormick adhered to the procedure she used with Demello and told Donovan that the single photo she was showing him was a photo of McElroy. This procedure was also undertaken approximately one month prior to the start of trial. As with Demello, there are exigent circumstances to justify such an unnecessarily suggestive identification procedure. Donovan claims to have interacted with McElroy on only a "few occasions" (page 3 Defendants' exhibit 3) prior to this suggestive identification procedure. Donovan most recently saw McElroy "one or two times" following a government executed search warrant in 2001 or 2002(page 3 of Defendants exhibit 3). Viewed in the totality of the circumstances, Donovan lacked familiarity with McElroy such that when viewed in the totality of the circumstances, the single photographic show-up procedure was impermissibly suggestive and gives rise to a very substantial likelihood of misidentification. As with the Demello/McElroy relationship, none of

the factors supporting reliability of the identification are present in the Donovan/McElroy relationship. United States v. Nava-Ruiz, 515 F. Supp. 2d 198 , 203-206 (2007).

The government will prosecute this indictment based on a theory that McElroy was a principal and/or owner of DAK and used the straw companies PT and PTC as a means to avoid paying taxes. Accordingly, this illegally tainted identification connecting McElroy to any of these alleged two straw businesses is central to proof of the crimes charged and also highly prejudicial. (See indictment paragraph 4-6).

Wherefore, the Defendants request that the Court:

- i). suppress evidence of any and all photographic identifications, witness testimony or documentary evidence of an alleged identifications of McElroy as a principal, operator and/or owner of PT, PTC or DAK;
- ii). suppress and exclude from trial any evidence of any in-court identification procedures. Such identifications could only have been based on impermissibly suggestive and unreliable procedures;
- iii). suppress any evidence derived from such impermissibly suggestive and unreliable procedures as violative of the Defendants' Constitutional Rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States; and
- iv). the Defendants move the Court to Order the government to make no reference in opening statement or on closing argument to the existence or results of such identification procedures.

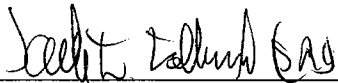
REQUEST FOR ORAL ARGUMENT

Pursuant to LR 7.1(D) the Defendants hereby request a full evidentiary hearing on this Motion.

Respectfully submitted:

AIMEE J. McELROY

By her attorney,



Jack I. Zalkind (BBO# 538840)

One International Place

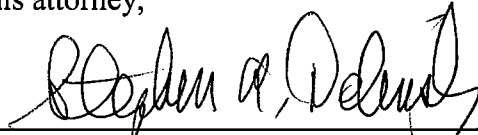
Boston, MA 02110

Telephone No. (617) 227.3950

Respectfully submitted

DANIEL McELROY,

By his attorney,



Stephen R. Delinsky (BBO# 119120)

ECKERT SEAMANS, CHERIN & MELLOTT, LLC

One International Place, 18th Floor

Boston, MA 02110

Telephone No. (617) 342.6800

DATED: January 25, 2008

CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on

By: S. R. Delinsky 1-25-08

EXHIBIT 1

COPY

- 1 -

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 01/23/2008

RICK DEMELLO, SEA FRESH, New Bedford, Massachusetts (MA) was contacted regarding his recollection of DANIEL MCELROY. DEMELLO thereafter provided the following information:

He described MCELROY as having blonde hair, being approximately 5'8" tall, thin and fair complected. Special Agent (SA) NANCY MCCORMICK advised DEMELLO that she was going to fax him a photograph of MCELROY. DEMELLO provided his fax number as 508-997-4322. (SA MCCORMICK faxed a REGISTRY OF MOTOR VEHICLES photograph of DANIEL MCELROY, Image Date: 02-04-1998, to DEMELLO.)

The next day, January 12, 2008, SA MCCORMICK contacted DEMELLO. DEMELLO advised he had received the fax and viewed the photograph. DEMELLO stated that while the image was dark, it looked like MCELROY as he recalled from his meeting with him.

Investigation on 1/10&11/2008 at Boston, MA (telephonically)

File # 196B-BS-86742 Date dictated 1/23/2008

by SA NANCY L. MCCORMICK/nlm

TO: RICK DEMELLO

SUS 111-1382

FM: NANCY MCCORMICK 617-223-6469



EXHIBIT 2

**Internal Revenue Service
Criminal Investigation Division**



Memorandum of Conversation

In Re:	AIMEE KING, et al	Location:	Telephonically
Investigation #:	040130259	Sea Fresh of New Bedford	
Date:	September 27, 2002		
Time:	10:42 AM		
Participant(s):	Rick DeMello, President Thomas Demeo, Special Agent		

I introduced myself to RICK DEMELLO (R DEMELLO) as a special agent with the Internal Revenue Service assisting the United States Attorney's office with a Grand Jury Investigation. I explained that the purpose of my visit to Sea Fresh on September 25, 2002 was to ask him a few questions regarding the use of temporary employees from DAILY A KING LABOR INC. (DAK), PRECISSION TEMP CORP. (PTC) and PRO TEMP CO. (PT). R DEMELLO agreed to speak with me and the following is a summary our telephone conversation.

1. R DEMELLO is the president of Sea Fresh of New Bedford (Sea Fresh). His telephone number is (508) 997-1260 and the fax number is (508) 997-4322. His wife is Kelly DEMELLO, the bookkeeper for Sea Fresh.
2. R DEMELLO stated that PT, PTC and DAK are one business that changes its name only. Dan MCELROY (MCELROY) is the owner of the temporary employment agencies. He is a short white male with blonde hair in his fifties.
3. R DEMELLO started using DAK in 1997. His first contact was with Charlie WALLACE (WALLACE). Subsequently, his contact was George WALLACE (G WALLACE). Both WALLACE and his brother G WALLACE worked for MCELROY.
4. R DEMELLO stopped using DAK for the following reasons; he felt uncomfortable, he had to make numerous phone call requesting the worker compensation insurance certificates, the name of the business continuously changes from DAK to PT to PTC back to DAK, some of the temporary workers received bounced checks, they started requesting payment early, they paid most of their employees cash and they could not supply extra workers. R DEMELLO switched to BJ Temp Service. The rates increased but R DEMELLO was more comfortable and satisfied with BJ Temp Services.
5. G WALLACE paid the temporary workers. Sometimes G WALLACE would hand out the payroll in front of R DEMELLO. R DEMELLO observed workers opening up envelopes and removing US Currency. R DEMELLO questioned G WALLACE and G WALLACE stated "We take out payroll Ricky". Subsequently, R DEMELLO again questioned G WALLACE and G WALLACE stated "Ricky we take out taxes". Though confirmed by G WALLACE that the temporary workers were receiving cash net of applicable payroll taxes and withholdings, R DEMELLO thought the contrary.

Handwritten signature of Thomas Demeo in black ink, with a small 'E' and a lightning bolt symbol to the right.

Thomas Demeo
Special Agent

EXHIBIT 3

COPY

- 1 -

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 12/28/2007

RICHARD DONOVAN, ON A ROLL SALES, 121 Liberty Street, Brockton, Massachusetts (MA), telephone 508-583-FOOD, was interviewed pursuant to a proffer agreement in the presence of his attorney, KEVIN MCGRATH. Participating in the interview was Assistant United States Attorney (AUSA) SARAH WALTERS. After being advised of the official identities of the interviewing parties and after reviewing and signing the proffer letter, DONOVAN provided the following information:

ON A ROLL (OAR) was first called BOOMERS INDUSTRIAL CATERERS. BOOMERS purchased a growing concern from CHRISTIE's and called it OAR. DONOVAN joined the company in 1990 as General Manager. The company had two locations and two markets. In the early 1990s, greater regulations were imposed on the food industry by the USDA and in 1994, OAR built a USDA approved facility and merged the two entities into OAR.

OAR uses a lot of temporary laborers as all its line workers are temps. When BOOMERS/OAR started, hiring temps gave the company "quick hits," bodies to fill positions at both locations as needed. Further, BOOMERS had a number of workers compensation claims and had been unable to get reasonable insurance coverage as their "mods were through the roof." Using temporary workers fixed the problem. Lastly, by using temp workers, OAR was not responsible for health insurance as that requirement became the responsibility of the temporary employment agency that provided the workers.

Temp workers have been a great option for OAR. People show up and do the work, yet they are employed by the temp agency and as such, the temp agency is responsible for everything, including workers compensation, taxes and health insurance. DAILY A. KING LABOR (DAK) even helped OAR establish the pay rate.

DONOVAN is familiar with DAK, PRO TEMP and PRECESSION TEMP/PTC. He associates them with one another and considers them all to be part of DAK because the salesmen that initially came to pitch temporary services represented themselves as being from DAK. The salesmen were MIKE POWERS and MARK RUSSO. Even though DAK changed its name a couple of times, the workers and the contacts always remained the same.

Investigation on 12/21/2007 at Boston, MAFile # 196D-BS-86742Date dictated 12/28/2007by SA Nancy L. McCormick/nlm

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Continuation of FD-302 of Richard Donovan, On 12/21/2007, Page 2

In approximately 1995 or 1996, OAR was struggling financially and was having trouble with the banks and paying its bills. OAR had payment terms with DAK which it was not meeting. After OAR bounced a check to DAK, DAN MCELROY and CHARLIE WALLACE "came knocking at the door." DONOVAN had never met either of them before. (DONOVAN was presented with a photograph and identified MCELROY from the photo.)

During the visit/meeting, MCELROY did most of the talking. MCELROY introduced WALLACE as the "tax guy/accountant." DONOVAN could not recall how MCELROY introduced himself, but DONOVAN's impression based upon the conversation was that MCELROY was in charge. As a result of the meeting, the previous terms were terminated. A weekly payment plan was set up and OAR agreed to go to a COD (cash on delivery) payment plan. Additionally, OAR paid DAK on Wednesdays, thus allowing DAK time to ensure OAR's check cleared before distributing the payroll to the temp workers on Friday.

At least initially, logistically, POWERS and/or RUSSO and WALLACE came by and gave the van drivers the pay for the workers who were transported to and from work in their vans. At least 3 to 4 vans of workers were dropped off and picked up daily. Later, the drivers picked up the payroll at DAK/PRO TEMP's offices. GEORGE WALLACE, after he was hired, served as backup to his brother, CHARLIE WALLACE.

The number of temporary workers used by OAR was fairly steady. If a change in the number of workers was necessary, DONOVAN would typically make the request of the van drivers because they were there on a daily basis and could provide the quickest response. DONOVAN also dealt with RUSSO, POWERS and later WALLACE and his brother.

As OAR's business grew and production needs expanded, the company began operating on weekends as well as week days and needed a bigger group of available workers to cover the new shifts. DONOVAN contacted WALLACE to accommodate these changes.

The temporary workers were paid in cash. DONOVAN knows this because whenever there were discrepancies in a worker's pay, the worker came to DONOVAN and notified him that he/she had not been paid enough. Typically, the worker handed the envelope, with the cash inside, to DONOVAN. DONOVAN was

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Continuation of FD-302 of Richard Donovan, On 12/21/2007, Page 3

responsible for reporting the hours to DAK/PRO TEMP and knew each worker's pay rate. In an attempt to resolve the discrepancy, DONOVAN counted the cash, pulled the worker's time cards to see what his/her pay should have been. He also reviewed what he submitted to DAK/PRO TEMP to make sure he had not made a mistake and submitted the wrong hours.

DONOVAN was presented with a white envelope and asked if that type of envelope looked familiar. DONOVAN advised that the envelope was the same as the envelopes in which temp workers received their cash/pay. The envelopes were smaller in size than the envelopes that contain paychecks and did not have a see through glass like window.

Initially, the cash envelopes were labeled with the names of the employees only. Later, because there were so many discrepancies, the dollar amount contained within the envelope was also added. DONOVAN estimated that there were problems with temp employees' pay at least 1 or 2 times per week.

DONOVAN was presented with a form in the name of OAR and asked if it looked familiar. DONOVAN advised it was a sign sheet and that temp employees used to sign their names on the sign sheets in the OAR lunchroom upon receipt of their pay. The drivers were handed the sign sheets with the cash envelopes folded up inside. Drivers included ROBERT MUNRAYOS, EDDIE OCHOA, MARCOS (RODRIGUEZ) and MARTA (RODRIGUEZ). Van/workers came in from Chelsea and Providence.

DONOVAN interacted with MCELROY on a few occasions. MCELROY came by on holidays because OAR had become such a big client and was billing so many hours. DONOVAN occasionally ran into MCELROY in area restaurants as they were both local guys. DONOVAN does not recall ever meeting MCELROY's wife, AIMEE KING.

At some point in 2000 or 2001, OAR stopped using DAK/PRO TEMP. DONOVAN recalled calling MCELROY after reading about the government's search of DAK's offices in the local newspaper. DONOVAN asked MCELROY what was going on to which MCELROY responded with words to the effect, "Don't worry. This is all a misunderstanding. Everything is going to work out." MCELROY indicated the search was conducted by the FBI only and was generally very evasive about the issue. But some of the drivers had been interviewed and they mentioned that the IRS was

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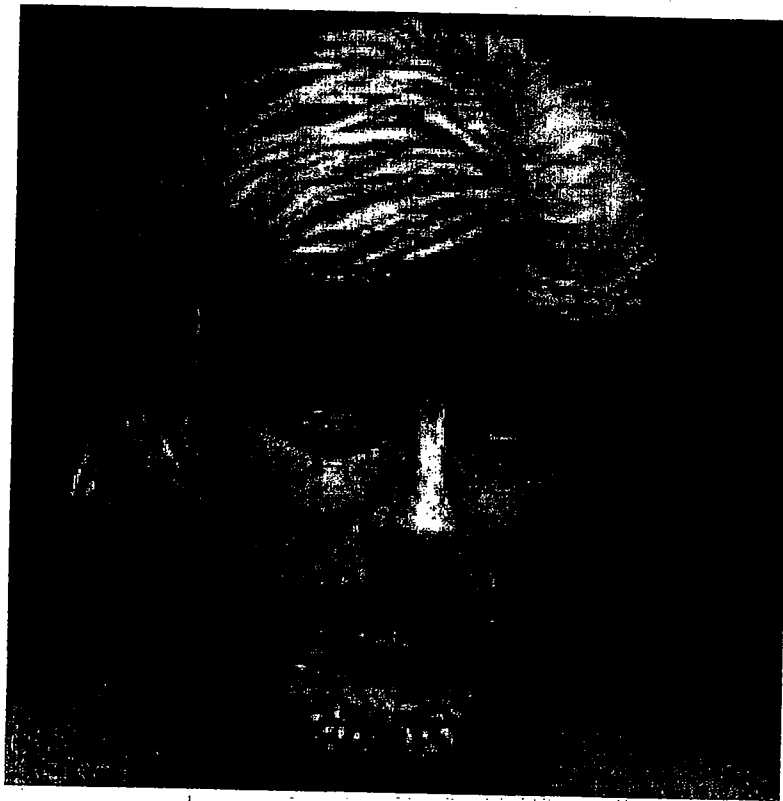
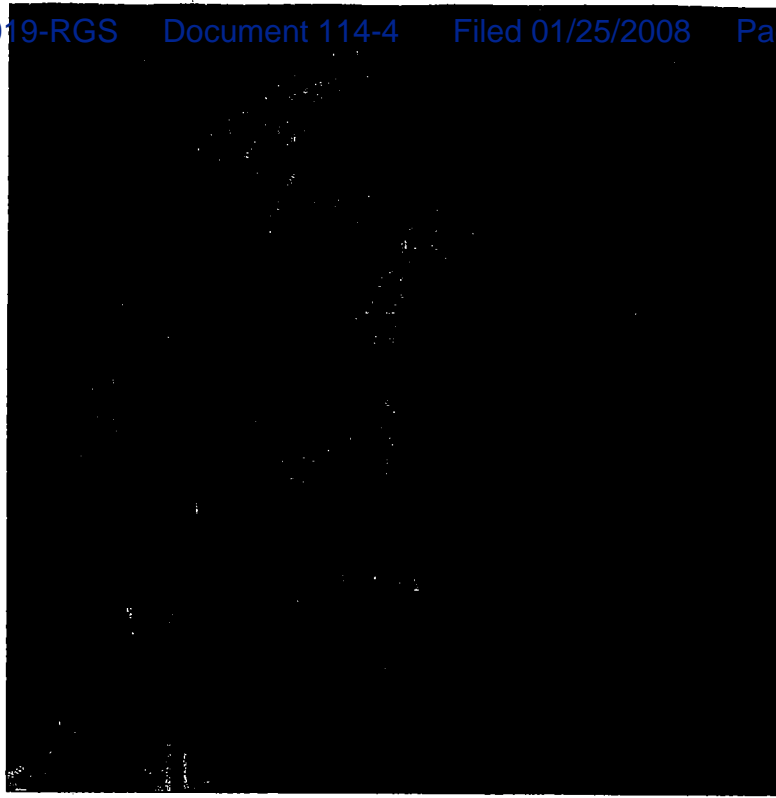
Continuation of FD-302 of Richard Donovan, On 12/21/2007, Page 4

involved as well. With everything DONOVAN read and heard, he became very concerned and contacted MCELROY again.

MCELROY came to see DONOVAN at least once if not twice after the search. WALLCE was with MCELROY during the face to face meeting wherein MCELROY told DONOVAN that things were not working out and that he was shutting the operation down. MCELROY told DONOVAN that he had found OAR a replacement agency and stated words to the effect, "I cut you over to another company located in Boston. I'll introduce you to the owner." MCELROY told DONOVAN that WALLACE would be going to work for the new owner, HAROLD KNIGHT, as part of the transition and that the temporary workers would remain the same.

The replacement company was called LABOR NOW and was owned by KNIGHT. KNIGHT previously wrote DAK/PRO TEMP's insurance and provided them with their insurance certificates. OAR had to re-do all the employment applications for LABOR NOW because they had all been confiscated in the search. OAR had applications within their office space which the workers filled out and DONOVAN subsequently submitted to LABOR NOW.

OAR used LABOR NOW for a few years before switching companies again. The switch came after KNIGHT advised DONOVAN that LABOR NOW was not getting the mark up it needed with OAR and that he was not happy with the arrangement any longer. WALLACE told DONOVAN that he some partners were going to be starting up their own temporary employment agency and that KNIGHT was okay with the move. DONOVAN began using WALLACE's company, now known as ATS. As after the move to LABOR NOW, the workers remained the same after the move to ATS.



PRO TEMP COMPANY
750 WASHINGTON STREET
SOUTH EASTON, MA 02375

ON A ROLL
121 LIBERTY STREET
BROCKTON, MA 02401

W/E 2/21/98

WORKER	DUE WORKER2	LINE
AMBROSINA VARELLA	\$ 150	Ambrosina Varela
AMILCAR DEPINA	\$ 250	Amilcar de Lima
CARLA OLIVEIRA	\$ 211	Carla Oliveira
CLARA GONSALVES	\$ 207	Clara Goncalves
CUONG LAM	\$ 54	Cuong Lam
ELIZABETH SANTOS	\$ 183	Elizabeth Santos
ESTEPHANIA RIBERIO	\$ 273	Estefania Ribeiro
FILOMENA GOMES	\$ 162	Filomena Gomes
FLAVIO DE PINA	\$ 215	Flavio de Pina
GEORGE GOMES	\$ 332	George Gomes
INACIA MARTINEZ	\$ 345	Inacia Martinez
JOAO ANDRADE	\$ 268	Joao Andrade
JOSE LOPES	\$ 219	Jose Lopes
JULIA ROSA	\$ 261	Julia Rosa
LAUREGO CENTEIO	\$ 263	Laurego Centeio
LIDIA SILVIA	\$ 258	Lidia Silvia
LOAN LAM	\$ 54	Loan Lam
LOU MILERO	\$ 363	Lou Milero
MARIA LOPES	\$ 229	Maria Lopes
MARIA SANTOS	\$ 121	Maria Santos
MARIA VICENTE	\$ 329	Maria Vicente
MIGUEL MARTINEZ	\$ 426	Miguel Martinez
MIKE GOODWIN	\$ 39	Mike Goodwin 2nd
MIZE ROSA	\$ 265	Mize Rosa
PAULA DUARTE	\$ 214	Paula Duarte
RUTH ELIAS	\$ 106	Ruth Elias
THU TRAN	\$ 187	Thu Tran
TUYET BUI	\$ 339	Tuyet Bui

PRO TEMP COMPANY
750 WASHINGTON STREET
SOUTH EASTON, MA 02375

ON A ROLL
121 LIBERTY STREET
BROCKTON, MA 02401

W/E 2/21/98

<u>WORKER</u>	<u>TOTAL ORIGIN</u>	<u>HOURS</u>	<u>GROSS PAY</u>	<u>TRAVEL</u>	<u>DUE WORKER2</u>	<u>LINE</u>
CALLETANO PORTILLO (W/NIGHT we 2/28)		37.50	\$206	\$20	\$	✓ 186 Calletano Portillo
BRENDA ROMAN	NIGHT	39.32	\$216	\$20	\$	196 Brenda Roman
CALLETANO PORTILLO	NIGHT	39.32	\$216	\$20	\$	✓ 196 Calletano Portillo
CALLETANO PORTILLO (W/NIGHT we 2/14)		8.00	\$44	\$4	\$	✓ 40 Calletano Portillo
FLORIVERTA GONZALEZ	NIGHT	39.13	\$215	\$20	\$	195 Floriverta Gonzalez
GUILLERMA VASQUEZ	NIGHT	39.77	\$218	\$20	\$	198 Guillerma Vasquez
MEDARDO PALENCIA	NIGHT	39.30	\$216	\$20	\$	196 Medardo Palencia
NANCY ESTRADA	NIGHT	39.98	\$239	\$20	\$	219 Nancy Estrada
REINA SANCHEZ	NIGHT	39.15	\$215	\$20	\$	195 Reyna Sanchez

payroll

PRO TEMP COMPANY
750 WASHINGTON STREET
SOUTH EASTON, MA 02375

MODERN FISH CO., INC.
16 HASSEY STREET
NEW BEDFORD, MA 02740

N/E 05/20/2000

DUE

W

BI

BE

CE

DA

DA

ER

ES

\$138

HERIBERTO MONTANO

07/11/01
asn

FEL

\$440

Redd. Co. - R.

never picked up so George
p/u 8/4/00

HERIBERTO MONTANO

\$138

ISMAEL RODRIGUEZ

\$400

Ismael Rodriguez

JORGE CARDOZA

\$320

DANIEL CARDOZA

JOSE DAVID SUSTAITA

\$400

Jose David

JOSE DURAN

\$203

Jose Duran

JOSE GARCIA

\$480

Jose Garcia

JOSE LUIS FLORES

\$280

Jose Luis Flores